SAAD AWANG & ANOR

v.

DARUS MD. TAIB & ORS.

HIGH COURT MALAYA, ALOR SETAR
SYED AGIL BARAKBAH J
[CIVIL SUIT NO. 49 OF 1975]
24 APRIL 1982

CONTRACT: *Specific Performance - Agreement regarding land - Whether contract of sale - Whether Kedah Limitation Enactment No. 60 / Limitation Ordinance 1953, applicable - Whether agreement forgery.*

CONTRACT: *Damages - Whether defendant guilty of fraud.*

CIVIL PROCEDURE: *Application for amendment of statement of claim - Whether late application prejudicial of defendant.*

The plaintiffs brought the action for specific performance of an agreement for sale of land alleged to have been entered into between them and the father, now deceased, of the defendants, in 1941. They had been delivered possession of the land and the title deed upon execution of the said agreement. The plaintiffs also claimed damages for fraud, the 1st defendant, as administrator of the deceased, having obtained an order of distribution of the estate without giving notice thereof on the plaintiffs and without disclosing to the Court the true position of the land.

The defendants, on the other hand, alleged that the agreement was a forgery and that the plaintiffs had been in possession of the land as tenants. They also contended that the plaintiffs' claim was barred by time.

At the conclusion of the hearing, the plaintiffs applied for amendment of the statement of claim. This was objected to by the defendants on the ground that it was made at such a late stage and was prejudicial to the defendants.

Held:

[1] The amendment should be allowed in the interest of justice. It did not in any way prejudice the defence case. [*Yoong Leoh Kee Corporation Sdn. Bhd. v. Chin Thong Thai* [1981] 2 MLJ 21 at 22].

[2] Considering all the factors, the balance of probabilities pointed to the plaintiffs having purchased the land from the deceased outright in 1941.

[3] The Limitation Act did not apply as the plaintiffs were claiming for specific performance as equitable owners in possession of the land. [*Williams v. Greatrex* [1975] 1 WLR 31, 36; *Othman & Anor. v. Mek* [1972] 2 MLJ 158, 164; *Bachan Singh v. Mahinder Kaur & Ors.* [1956] 22 MLJ 97, 98].

[4] Even if it did apply, the plaintiffs were well within time.

[5] The plaintiffs succeeded in proving fraud on the part of the 1st defendant beyond reasonable doubt (*Saminathan v. Pappa* [1981] 1 MLJ 121 PC). But in a successful application for specific performance there ought to be no necessity to prove fraud.

[6] The defendants had failed to prove that the agreement was a forgery or that the plaintiffs were tenants.

[Judgment for the plaintiffs.]

Cases referred to:
Yoong Leoh Kee Corporation Sdn. Bhd. v. Chin Thong Thai [1981] 2 MLJ 21
Williams v. Greatrex [1957] 1 WLR 31
Othman & Anor. v. Mek [1972] 2 MLJ 158
Bachan Singh v. Mahinder Kaur & Ors. [1956] 22 MLJ 97
Saminathan v. Pappa [1981] 1 MLJ 121

Legislation referred to:
Limitation Ordinance 1953, s. 9

For the plaintiffs - A. Jayadeva
For the defendants - Ajmer Singh

JUDGMENT

Syed Agil Barakbah J:

This action brought by the two plaintiffs involves a piece of padi land comprised in SPK No. 3336, Portion No. 149 situate in the Mukim of Guar Kepayang, in the District of Kota Setar, in the State of Kedah containing an area of 6 relongs 189 jembas (hereinafter called "the said land"). The said land is registered in the name of Mat Taib bin Penghulu Mat Ali who died intestate (hereinafter referred to as "the deceased"). The first defendant is the administrator of the estate of the deceased. Letters of administration were granted to him on 2 June 1970 in petition no. 74 of 1970 and was extracted on 29 April 1973. After obtaining the said order the first defendant transferred the said land to the beneficiaries *viz*: himself, second, third and fourth defendants, Md. Noor bin Taib (since deceased) and Udoh binti Husin (since deceased), according to the Muslim law of distribution. In their pleading the plaintiffs allege that in or about the year 1941 the deceased sold the said land to them under an agreement in writing for the consideration of RM450 as the purchase price and which sum was paid to him on the execution of the said agreement. Thereupon the deceased delivered possession of the land and the title deed to the plaintiffs. Since then the plaintiffs have been continuously in possession of the said land without any interruption by the deceased and/or the defendants until subsequently. The deceased was unable to transfer the said land to the plaintiffs owing to the outbreak of the Japanese war. So another agreement in writing dated 10 June 1944 was executed wherein the deceased confirmed the terms and conditions of the earlier agreement (Ex. P1). The first agreement was not produced at the hearing. The deceased died without having transferred the said land to the plaintiffs who on or about 12 June 1948 lodged a caveat against the said land in order to protect their rights and interest therein.

The plaintiffs aver that upon the execution of the agreement for the sale of the said land the deceased became a bare trustee holding the same in trust pending the execution of a proper registrable transfer to them. Further, on his death the first defendant as administrator of the estate came into the shoes of the deceased. It is further alleged that the first defendant, in breach of the said trust and in fraud of the plaintiffs, obtained the order of distribution without giving notice thereof on the plaintiffs and without disclosing to the Court the true position of the said land. The plaintiffs pray *inter alia* for a declaration that they are the owners of the said land, that the deceased, the defendants and the two other deceased beneficiaries held the said land in trust for the plaintiffs in equal shares and that the proper registering authority do cancel and expunge the presentation of transfer registered against the said land in the Registrar of Titles. They also pray for specific performance of the agreement and damages for fraud apart from injunction and costs.

The defendants on the other hand deny the execution of the two agreements; they allege that Ex.P1 was never executed by the deceased at all and is a forgery. They maintain that the plaintiffs were tenants of the deceased relating to the said land and have been in possession thereof in such capacity. They aver that the plaintiffs in spite of being fully aware of the application for letters of administration, have failed to lodge any objection or claim as purchasers thereof. The defendants contend that the plaintiffs' claim is barred by the Kedah Limitation Enactment No. 60 and the Limitation Ordinance, 1953. The first defendant also contends that as he is no longer the administrator of the estate having completed the administration thereof, the plaintiffs' claim against him be dismissed with costs.

At the conclusion of the hearing Mr. Jayadeva applied for amendment to para. 2 of the statement of claim. The amendment relates to the date of the deceased's death i.e. "on or about the year 1945". In fact it was the second amendment reverting to the same date as originally pleaded since at the commencement of hearing the first amendment was from "1945" to "1943" according to the date stated by the defendant in his application for letters of administration of the deceased's estate. Subsequently, having obtained a certified copy of the death certificate (Ex. P2), the second amendment was applied for. It was objected to by the Counsel for the defendant, Mr. Ajmer Singh, on the ground that it was made at such a late stage and was prejudicial to the defendants' case. With respect I agree that in the first place the first amendment ought not to have been made at all at the commencement of the trial or the latter ought to have been applied for at the close of the plaintiffs' case because as a general rule Courts refrain from allowing amendments at such a late stage. Nevertheless, considering the evidence adduced I was of the view that it ought to be allowed in the interest of justice and the amendment did not in any way prejudice the defence case. The document (Ex. P1) is quite old and dated according to Thai calendar. I am satisfied that the first amendment was the outcome of a genuine and inadvertent error in calculating the correct Gregorian year. Hence it was necessary to revert back to the original pleading to the year 1945 as reaffirmed by the death certificate (Ex. P2). In view of the amendment I gave the opportunity to the defence counsel to recall any of the witnesses who had testified. On his request an adjournment was granted and when hearing resumed, Mr. Ajmer Sing submitted that he did not wish to recall any. I am therefore of the view that this was a fit and proper case to allow the amendment to be made in the interest of justice. (*Yoong Leoh Kee Corporation Sdn. Bhd. v. Chin Thong Thai* [1981] 2 MLJ 21 at 22).

There are several triable issues both on facts and law but the first issue is whether the deceased in fact entered into the two agreements of sale with the plaintiffs and thereafter delivered possession of the said land to them or whether the plaintiffs are merely tenants of the deceased.

The plaintiffs' testimony on the matter was quite brief. Most of the evidence and cross-examination were confined to the execution of Ex. P1 and other relevant matters. According to the first plaintiff the first agreement was also in writing executed sometime in 1941 prior to the Japanese occupation. He paid the purchase price of RM450 in full to the deceased who handed him the title deed. He and the second plaintiff, who is his elder sister, then entered the said land, cultivated it and remained in occupation until today. In cross-examination the first agreement was returned to the deceased after the execution of the second agreement (Ex. P1). There were discrepancies in the plaintiff's evidence. The second plaintiff said that the purchase price of RM450 was paid to the deceased after the execution of the second agreement (Ex. P1). That contradicted the first plaintiff's version. Secondly both plaintiffs stated that they thumbprinted on Ex. P1 which, however, was a declaration signed by the deceased and witnessed by his younger brother (since deceased) confirming the sale of the said land to the plaintiffs. To my mind, the lapse of nearly 38 years contributed to their

forgetfulness due to poor retention of memory, which was normal in the circumstances. I am satisfied that the discrepancies are minor. On the other hand Ex. P1 speaks for itself in clear terms. Moreover the plaintiffs' evidence were reinforced by the production of the title deed filed in the agreed bundle of documents (Ex. A1). I am mindful that no registered owner would part with a title deed to a stranger unless there is a transaction of some sort as regards the land which it represents. The plaintiffs have been in possession of the title deed and the land all the while but could not have the deed registered in their names because of the war and the death of the deceased. That factor in my opinion is a strong indication that the first sale agreement was executed. Further evidence in support of it can be seen from the caveat filed by the plaintiffs on 15 June 1948, the payments of quit rents for a number of years as shown in the agreed bundle and the continuous payment of Zakat from 1966 to 1977 except for 1971 - 1972.

The evidence of the defendants were mere denials. The first defendant, the administrator of the estate, did not know anything about the transaction as he was only seven years old when the sale agreement was executed. He stated that sometime in 1970 he went into occupation of the said land and cultivated it till 1975. Prior to that he had seen the plaintiffs occupying the said land but did not stop them because he did not know that the land belonged to his father. He discovered subsequently after making a search in the Land Office. Thereafter he took up letters of administration and in 1975 distributed the said land to the beneficiaries. He denied that the plaintiffs ever showed him the sale agreement or requested him to transfer the said land to them. On the other hand he did not know who was in possession of the title deed nor did he ask the plaintiffs why they were occupying the said land.

The third defendant, the eldest son of the deceased, testified that before his father's death in 1943, he was staying with him in the same house. His father was about 80 years old then and was weak. He was taking care of his father and also looking after the said land. His father never informed him of any sale agreement for RM450. His father was too weak to go to Pendang to execute any agreement. He would have known if his father had done so because his father would have told him about it and would have asked him to accompany him. In cross-examination he admitted that although his father owned eight pieces of land he kept only the title deed to the said land until the time of his death. The title deeds to other lands were kept by his father's elder and younger brothers. It is surprising that the third defendant did not know that the same title deed was passed by his father to the plaintiffs well before his death. It is surprising that the third defendant did not know that the same title deed was passed by his father to the plaintiffs well before his death. It is more surprising that he also did not know the said land belonged to his father until he was told by someone years later. Considering the evidence I concluded that just like the first defendant, the third defendant knew nothing about the sale agreement, the payment of RM450 purchase price by the plaintiffs and the execution of Ex. P1 by his father. In the circumstances of the case and in the light of their evidence and their demeanour in the witness box, I do not consider them to be witnesses of truth. The 3rd defendant admitted he never collected any rent from the plaintiffs. Considering all these factors as a whole, albeit with care and caution, the balance of probabilities points to the plaintiffs having purchased the said land from the deceased outright for the sum of RM450 which had been paid and received by the deceased in his lifetime in 1941 and subsequently confirmed by him in 1944 in Ex. P1.

The next point that arises is whether the period of limitation within which the plaintiffs have to file the writ, applies. It is pleaded at para. 9 of the statement of defence that the plaintiffs' claim is barred by the Kedah Limitation Enactment No. 60 and/or by the Limitation Ordinance.

Mr. Jayadeva submitted that in so far as the plaintiffs' prayer for specific performance of the contract the laws of limitation does not apply on the principle enunciated in *Williams v. Greatrex* [1957] 1 WLR 31, 36. The principle was discussed in detail and followed by the Federal Court in *Othman & Anor. v. Mek* [1972] 2 MLJ 158, 164. Ong Hock FJ (as he then was) stated:

> *Williams v. Greatrex* unfortunately was not brought to the attention of the Court of Appeal in 1959: The principle therein enunciated was so clearly applicable that it is impossible to conceive that our Appeal Court would, lightly have brushed them aside, without saying a word to explain why those principles should not apply.

The facts in that case are quite similar to the present case. It was held:

> (3). That the purchaser, having paid the deposits and on having entered into possession of the land, became the equitable owner of the land under a contract binding on the vendor such that the vendor could not now object to specific performance on the ground of laches unless he could show that he had not acquiesced in the purchaser's act of possession or that the purchaser had abandoned the contract; and that the evidence showed sufficient acquiescence by him and no abandonment by the purchaser.
>
> Accordingly, despite the lapse of time, the purchaser was entitled to specific performance on payment of the balance of the price and interest thereon for the intervening years.

With regard to the purchaser's delay in proceeding with the specific performance it is said in *Othman v. Mek* (supra):

> ... A very long time elapsed without his taking the vendor to Court. But I think the answer to it is this: once the purchaser went into possession of the land, having the contractual right to be there, he not only had an equity to be there, but also the benefit of a contract to sell him these two plots. That was not only an enquity: it was an equitable interest in the land. He was in a sense the equitable owner of the land. So long as he was in possession of the land, he does not lose his rights simply by not proceeding at once for specific performance.

In the present case in spite of the delay which as stated earlier was not without reasons, the plaintiffs are seeking to establish their personal right or right *ad rem* under the contract with a view to making it a real right or right *in rem* against the world as a whole by having it registered in accordance with the National Land Code. (See *Bachan Singh v. Mahinder Kaur & Ors.* [1956] 22 MLJ 97, 98, Thomson J (as he then was). The evidence in the present case however showed an attempt not by the deceased, but by his beneficiaries to exclude the plaintiffs from possession of the said land. According to the plaintiffs the defendants took possession of the land by force for only one season and thereafter they re-entered the land and resumed possession until today. The defendants on the other hand maintained to have entered and remained in possession thereof for about five years. Their evidence however are mere allegations which are materially contradicted by the quit rent receipts found in the agreed bundle of documents (Ex. A1) which show the plaintiffs having paid the rents from the years 1970 to 1974 inclusive and thereafter in 1977 (pp. 11 to 16). That supports and explains the letter written by the OCS Pendang to the first plaintiff dated 6 March 1975 over the latter's alleged re-occupation of said land by force as reported by the third defendant (see p. 17 of Ex. A1) to the police. It was likely therefore in the circumstances that the defendants went into occupation between the later part of 1974 (i.e. after the payment of quit rent by the plaintiff in that year on 23 September 1974) and March 1975 (according to the OCS's letter), well indicating that the defendants had occupied the land for one or two seasons only. The plaintiffs having reoccupied the land thereafter and continued to remain in occupation until now, it cannot be said that they have abandoned the contract as indicated

in *Williams v. Greatrex*. On the contrary the evidence point clearly to the land being taken forcibly by the defendants and thereafter being re-possessed by the plaintiffs in the exercise of their right in the contract with the deceased. I am therefore of the view that the Limitation Act does not apply in this case. If at all it is applicable, the provision of s. 9 of the Limitation Ordinance comes into play as the Kedah Enactment was repealed on 19 February 1953. The plaintiffs' right of action accrued from the time such right was demanded and refused. The most likely date was 2 June 1970 when the first defendant applied for letters of administration. The first plaintiffs's evidence of going to see third defendant about the land is not denied by the latter in his evidence. The plaintiffs filed their writ on 1 March 1975. It is clear therefore they are well within time.

As regards the plaintiffs' allegation of fraud, I accept their evidence that the defendants well knew of the agreements and the sale of land to the plaintiffs prior to the petition of letters of administration. In spite of that the first defendant obtained the order of distribution and distributed the said land to the beneficiaries including himself instead of transferring the said land to the plaintiffs. He had failed to disclose the true position to the Court in the petition of letters of administration. In my considered judgment the plaintiffs succeeded in proving fraud on the part of the defendant beyond reasonable doubt. (*Saminathan v. Pappa* [1981] 1 MLJ 121 PC).

I am further of the view that in the case of this nature where the equitable remedy of specific performance is successfully applied for there ought to be no necessity for proving fraud in the light of the principles discussed earlier. On the other hand the defendants have failed to prove their allegation that Ex. P1 was a forgery and that the plaintiffs were tenants.

I therefore give judgment in favour of the plaintiffs as prayed with costs, except for prayers 7, 8 and 9 which were not proceeded with.

Also found at [1982] CLJ 564